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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 48

FEDERAL POWER COMMISSION, PETITIONER

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The orders of the Federal Power Commission (R. 524–540, 585–591) are reported at 24 F.P.C. 204 and 525. The opinions of the Court of Appeals for the Fifth Circuit (R. 635–646) are reported at 293 F. 2d 761.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1961 (R. 647). A petition for rehearing, timely filed, was denied on October 5, 1961 (R. 648). The petition for a writ of certiorari was filed

on December 8, 1961, and granted on January 22, 1962 (R. 660), 368 U.S. 974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Tennessee Gas Transmission Company, a natural gas pipeline company, filed increased rates predicated on a cost of service which included a claim to a 7 percent rate of return on net investment. After suspension by the Commission for the full five months permitted by law, the new rates went into effect subject to refund of any portion not ultimately justified by the pipeline company in the proceedings before the Commission. Several months later, the Commission, treating separately the issue of rate of return, found, after full hearing, that 7 percent was excessive and that 6⅛ percent would be proper. It thereupon ordered a reduction, *pro tanto,* of the increased rates being collected subject to refund.

The question, which arises under Section 4 of the Natural Gas Act, is whether the Commission upon finding that one component of the company's justification for the increased rates is deficient may immediately order the rates reduced to that extent without awaiting the completion of all phases of the rate proceeding.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, are set forth in the Appendix A, *infra,* pp. 47–51.

STATEMENT

The increased rate filing.—On October 5, 1959, Tennessee Gas Transmission Company, a natural gas company engaged in the pipeline transmission business, tendered increased rates for filing pursuant to Section 4(d) of the Natural Gas Act, *infra*, p. 48. These rates would result in an annual increase of $26,590,138 in Tennessee's revenues based on sales for the year ended July 31, 1959 (R. 503).[1] The need for this increase was predicated upon a claimed cost of service which included a rate of return of 7 percent on net investment (R. 498–501).

By order of November 4, 1959, the Commission set a hearing to determine the lawfulness of these new rates and suspended their operation for the statutory maximum of five months (R. 502-505). The hearing started on February 2, 1960 (R. 524).[2] On

[1] This increase was in addition to previous increases (F.P.C. Docket Nos. G–11980 and G–17166) which are still pending before the Commission in rate proceedings. Those increases had become effective, subject to refund, on July 14, 1957, and May 15, 1959, respectively. The increased rates filed on October 5, 1959, were intended to produce about $75,000,000 more in annual revenues than the rates last approved by the Commission. The lower figure mentioned in our petition for certiorari resulted from adding up the three increases computed on the basis of rates figures as of the time each set of increased rates was filed. The $75,000,000 figure is derived by substracting the revenues which would be produced by the last Commission-approved rates applied to test year sales figures (which are substantially in excess of the test year sales figures related to the earlier rates) from the revenues the interim rates would produce on the same sales figures.

[2] The Commission had originally ordered the hearing to commence on December 15, 1959 (R. 504), but by notice of November 16, 1959, granted Tennessee's request for a postponement.

April 5, 1960, at the close of the five-month suspension period and during the course of the hearing, the rates became effective, subject to an undertaking by Tennessee to make refund of any portion found by the Commission not justified, together with interest thereon (R. 505–509).

At the hearing, Tennessee presented all of its direct evidence. Its witnesses, however, were cross-examined only on the issue of rate of return. The staff of the Federal Power Commission and one intervener, the West Virginia Public Service Commission, presented evidence only on the rate of return, and their witnesses were cross-examined. None of the other interveners sought to present evidence on rate of return. Tennessee then presented rebuttal testimony on rate of return; cross-examination on this testimony was concluded on May 25, 1960 (R. 524–525).

After all the evidence on rate of return had been presented, the Commission staff counsel moved that the proceeding be divided into two phases: (1) determination of rate of return; (2) determination of the various other factors entering into the company's cost of service and allocation thereof. He proposed further that, if it were found in the first phase that a proper rate of return was less than 7 percent, the Commission enter an interim order reducing Tennessee's rates *pro tanto* and directing corresponding refunds for the past.[3] Concurrently, staff counsel requested waiver of the examiner's intermediate decision on the issue of the rate of return (R. 525).

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[3] This proposal contemplated acceptance of all of Tennessee's other claims for purposes of the interim order.

Tennessee opposed this interim order procedure,[4] relying upon the fact that the proper method of allocating Tennessee's cost of service among its six zones was contested in this proceeding, and that in another proceeding relating to Tennessee's rates for an earlier period (F.P.C. Docket No. G-11980) the zone allocation issue had been tried and was awaiting decision by the hearing examiner (R. 591-606).[5]

On June 17, 1960, the Commission granted the motion to waive the intermediate decision on rate of return and provided for oral argument on that issue and on the question whether interim rate reductions and refunds should be ordered in the event that Tennessee's 7 percent figure was found excessive (R. 513-516). Thereafter, on July 19, 1960, Tennessee filed an untimely[6] motion requesting the Commission to waive the intermediate decision procedure

[4] Several interveners, including the other respondents here, also opposed this procedure (R. 607-625). The related proposal of waiver of the examiner's decision on rate of return was unopposed (R. 513).

[5] Tennessee also pointed out that the hearing examiner in No. G-11980, who was also the examiner in this case, had ruled that determination of the zone allocation issue in that proceeding would govern the method of allocating costs among Tennessee's six zones in the instant case (R. 605). The Commission, when it decided the allocation issue in G-11980, expressed agreement with this procedure. *Tennessee Gas Transmission Co.*, decided February 6, 1962, 42 P.U.R. 3d 145, 146, 158.

[6] The Commission's rules provide that motions requesting waiver of the examiner's intermediate decision shall be made no more than five days after conclusion of the hearings. 18 C.F.R. 1.30(c)(3). Hearings on the severed zone allocation issue in Tennessee's earlier case were concluded on December 17, 1959 (R. 522). The untimeliness of Tennessee's motion was referred to by the Commission in denying the motion (R. 522).

with respect to the zone allocation issue in the other proceeding (No. G–11980) and to decide that issue simultaneously with the rate of return issue in this proceeding (R. 519–521). This motion, which was opposed by a number of parties (including the Columbia companies,[1] R. 650–659) was denied on August 5, 1960 (R. 521–523).

On August 9, 1960, the Commission entered the order challenged below. It found that an overall rate of return of 6⅛ percent was fair, just and reasonable for Tennessee (R. 526–535). Accordingly, it disallowed Tennessee's rates, computed by the company on the basis of the excessive (7 percent) rate of return. It specified, however, that the company might file interim reduced rates (R. 537–539) based upon the 6⅛ percent rate of return and that such interim rates would become effective (subject to possible further refund at the conclusion of the entire rate proceeding) as of April 5, 1960, the date on which the disallowed rates had gone into effect. Refunds were to be made to the extent that the company had collected amounts in excess of said interim rates since April 5, 1960 (R. 539–540). The Commission pointed out that by permitting Tennessee to file substitute rates based on a proper rate of return, but otherwise based on the company's own claims, Tennessee and its customers would be placed in the same position as if Tennessee had originally filed increased rates predicated upon a proper rate of return (R. 535–536).

[1] Respondents, The Manufacturers Light and Heat Company, The Ohio Fuel Gas Company and United Fuel Gas Company, who are members of the Columbia Gas System, are collectively referred to as the Columbia companies.

On September 27, 1960, the Commission denied applications for rehearing filed by Tennessee and the Columbia companies (R. 585–591). Both applications questioned the validity of the interim order procedure, and Tennessee also challenged the determination of the rate of return. The interim rates, which have resulted in an annual revenue reduction of about 10¾ million dollars, based on test year figures, have been collected since November 1, 1960.[9]

Proceedings in the court below.—The court below unanimously affirmed the Commission's determination that a 6⅛ percent rate of return was just and reasonable for Tennessee, but by a divided vote set aside the Commission order to the extent that it required Tennessee to make lower rates effective immediately and to refund the amounts collected in excess of the substitute rates.[9]

On the interim order issue, Judge Wisdom's opinion for the court (Chief Judge Tuttle dissenting, Circuit Judge Cameron concurring in the result only)[10] concluded that, in the absence of a Commission decision on the zone cost-allocation issue, there was no basis for determining which of Tennessee's rates were unlawful; and that, although a natural gas

[8] Stays of the reduction and refund order were denied by the Fifth Circuit, Judge Wisdom dissenting (R. 632–634; *Tennessee Gas Transmission Co.* v. *Federal Power Commission*, 283 F. 2d 729 (C.A. 5)). After its decision on the merits, the Fifth Circuit stayed its mandate until final disposition of the case by this Court (R. 648–649).

[9] Tennessee has refunded $7,416,663, plus interest, for the period from April 5, 1960, through October 31, 1960.

[10] Chief Judge Tuttle wrote the part of the court's opinion affirming the Commission's rate of return decision.

company has the burden of justifying increased rates proposed by it, it "should not be held, at its peril, to the requirement of foretelling the decision of the Commission on the correctness" of such increased rates (R. 643). The opinion also states that, regardless of the Commission's authority, the allocation of costs among zones is "such an essential element in determining whether the filed rates are excessive" that issuance of the interim order in advance of decision on the allocation issue was an abuse of discretion (R. 643). Chief Judge Tuttle, dissenting, stated that he would have affirmed the Commission's order giving immediate effect to the conclusion that the rates based on an excessive rate of return were unreasonable. In his view, the applicant had the burden to establish each component upon which it predicated its rate increases, including the allocation of the cost of service to each of the rates filed. As a result of the interim order, Tennessee was in "no different position than if the Commission, after the section 4 hearing, decided that Tennessee was entitled to an overall return of 7 percent on its investment, just as asked for by Tennessee, but decided that the cost allocations between the several zones were discriminatory" (R. 646).

SUMMARY OF ARGUMENT

The Commission required Tennessee to reduce its increased rates without delay to the extent that they were predicated on an excessive claim (7 percent) for rate of return. For this purpose, the Commission assumed that Tennessee would be able to justify the increases insofar as they were controverted on

other grounds. In this way, the Commission, recognizing that other complex issues could not be resolved with equal expedition, sought to give substantial relief to the consumer promptly, while preserving the company's right to a full hearing and determination of all issues.

I. A. The Commission's rate powers under the Natural Gas Act are not limited to making final determinations of just and reasonable rates; it may also enter such orders "as it may find necessary or appropriate to carry out the provisions" of the Act. Section 16. Under the statutory scheme, the seller of natural gas initiates rates and rate changes. These rates, however, are subject to Commission review, and Section 4(e) expressly imposes upon the seller the burden of justifying increases. Here, Tennessee sought to support a set of increased rates on the basis of an overall cost of service, one component of which was a 7 percent return on net investment. As events proved, not more than 6⅛ percent could be justified—a difference of $11,000,000 per annum. At the time the interim reduction order was issued (four months after the increased rates had become effective), it was clear that disposition of the many other complex issues in the case could not be made until many months later and that consumers would continue to pay rates based on excessive claims if any reduction whatever had to await Commission determination of all issues in the rate proceeding.

In these circumstances, the Commission properly concluded that it had power to afford immediate relief to consumers, the primary beneficiaries of the

Natural Gas Act. Indeed, the courts have long approved the view that the Commission may require a company to file new or substitute rates, prior to the agency's final determination of just and reasonable rates, where the company's proof has failed to support its rates, either in whole or in part. See, *e.g.*, *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583–585.

The contrary view expressed in the opinion below gives no weight to the statutory provision requiring natural gas companies to provide a full justification of company-initiated rate increases. A company which files for increased rates must, under Commission regulations, make a full statement of all components of its cost of service—cost of purchased gas, labor, taxes, depreciation, return on investment, etc. A rate is not an indivisible entity but an aggregate of various components. If a company's proof fails to establish one of the ingredients upon which its claim to increased rates is predicated, those rates are, *pro tanto*, unsupported. This is the situation with respect to each of the Tennessee rates involved in this case.

B. The presence of an unresolved issue as to allocation of costs among zones does not curtail the Commission's authority to require an immediate reduction in rates that the company's showing has failed to justify. Tennessee's contention that because of that issue there is a possibility that it may not be able to recoup, for the refund period, the full revenues necessary to yield a 6⅛ percent return

does not support delay in ordering Tennessee to submit rates which, based upon its own estimates and allocations, will provide that return. The eventuality (not shown to have any probability of occurrence) that Tennessee might not be able to secure all the revenues to which it is entitled is not a result of the interim rate procedure the Commission adopted; that could also occur, in the absence of an interim order, if it were found, at the conclusion of the entire case, that Tennessee, although justified in its claimed cost of service, was entitled to more than the filed rates in some zones but required to make full refunds in other zones. Moreover, Tennessee has no greater risk today than if it had originally filed rates based on a proper allowance for rate of return. Customers in no event have an obligation to provide a "cushion" so as to insure a natural gas company against the consequences of a discriminatory rate structure.

C. The court below assumed that the refund provision of the Act is a satisfactory substitute for an early reduction of excessive rates. But experience has shown that refunds do not afford full protection to the consumers who ultimately pay the excessive charges. Some will leave the area of service before the refund is made and passed on through the channels of distribution. In any event, for the ordinary consumer, even if he does not move, the impact of immediate increased costs is not neutralized by the prospect of repayment later. Moreover, since natural gas competes for markets with other fuels, the loss of business opportunities resulting from ex-

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cessive rates (a loss which bears particularly upon pipeline customers for the gas and upon distribution companies) can never be restored.

The very fact that increased rates may be suspended for five months shows that Congress did not regard the refund provision as full protection for the consumer. This is also demonstrated by the history of the suspension and refund provisions in Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), upon which Section 4(e) of the Gas Act is based.

II. The Commission's decision to enter an interim order was a reasonable exercise of its discretion. At the time that order was issued (August 9, 1960), the Commission was in no position to decide the allocation issue. Indeed, the preparation and issuance of opinions on that subject—first by the examiner and later by the Commission—required an additional eighteen months. The majority below erred, therefore, in its assumption that the allocation issue was "ripe for decision" when the interim procedure was adopted. Moreover, other substantial issues which bear on Tennessee's cost of service still remain unresolved.

III. There is also objection to the interim order from a single group of customers—the so-called Columbia companies. Columbia is of the view that Tennessee's rates in the zones in which Columbia purchases from Tennessee are discriminatorily high. It suggests that Tennessee should be permitted to collect the full increases for which it filed so that it will

have greater assurance of accumulating enough revenues to guarantee Columbia all of the refunds to which Columbia may be held entitled at the conclusion of the rate proceeding. Columbia apparently believes that, if (*a*) it should establish wide discrimination as between zones and (*b*) the Commission should take the view that in all events Tennessee is entitled to a return of 6⅛ percent for the past period involved, there might not be enough to pay it full refunds. For various practical reasons discussed *infra*, the hypothesis that there might not be enough revenues for the interim period to give Tennessee a fair return and to afford Columbia full refunds is a highly improbable one. In any case, however, the Commission has not undertaken to guarantee Tennessee a 6⅛ percent return for the interim period. The determination that this figure represents a fair return does not constitute a holding that Tennessee is entitled to collect amounts sufficient to yield that return by means of a discriminatory system of rates.

Columbia also appears to argue that the Commission's interim order prejudges the issue of allocation of costs among zones. As the Commission proceedings make plain, there is no basis whatever for this contention.

ARGUMENT

The Commission order under review required Tennessee to reduce its increased rates so as to eliminate that portion of those rates which reflected an excessive claim for return on investment. For purposes of its order, the Commission assumed the cor-

rectness of the other claims asserted by Tennessee in support of its increased rates. On the rate-of-return issue, it found, after a full hearing and oral argument, that a 7 percent rate was not justified and that 6⅛ percent would be fair, just, and reasonable. Its determination on this point was unanimously affirmed by the court below and is not challenged in this Court.

Foreseeing that the complexity of the many other issues bearing on Tennessee's cost of service [11] and the problems involved in allocating that cost among Tennessee's zones would prevent a final determination of just and reasonable rates for a substantial period, the Commission ruled that Tennessee should not continue to collect its full increased rates predicated on a 7 percent rate of return until such a final determination could be made, but should, instead, file and collect substitute rates computed on the basis of a 6⅛ percent rate of return (R. 537–540). It also

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[11] The controverted issues on Tennessee's cost of service, aside from this rate of return issue, related principally to the income tax allowance, purchased gas cost adjustments, rate of depreciation, rate of return on production properties, and claims for off-pipeline system costs. Largely on the basis of these issues, the examiner has recently disallowed about $25,000,000 of the cost of service claimed by Tennessee in addition to the $11,000,000 involved here. *Tennessee Gas Transmission Co.*, F.P.C. Docket No. G–19983, decision issued May 28, 1962.

The complexity of these remaining cost-of-service issues is reflected by the length (165 pages) of the decision and the number of witnesses (31). Their testimony, covering about 3100 pages of transcript, took in excess of 18 days of hearing, over a period of more than one year, ending in April, 1961.

The testimony on rate of return, comprises about 1100 pages of transcript, requiring about 9 days of hearing spanning a period of about three months.

ordered, on the same basis, that the company refund the excessive amounts which had already been collected. In this fashion, the Commission sought to protect the ultimate consumer by reducing rates "as speedily as possible"[12] while also giving scope to the company's right to initiate new rates, to put them into effect (after the five-month suspension period) and to collect them until it has had its opportunity to justify them at a hearing.

I. UNDER THE NATURAL GAS ACT, THE COMMISSION WAS EMPOWERED, UPON DETERMINING THAT TENNESSEE'S INCREASED RATES WERE PREDICATED UPON AN EXCESSIVE CLAIM FOR RATE OF RETURN, TO ISSUE AN INTERIM ORDER DISALLOWING THE EXCESS

A. Sections 4 and 16 give the Commission power to disallow, by interim order, that portion of an increased rate which the proponent has failed to justify.

1. Under the Natural Gas Act, as this Court has recognized, the seller of natural gas initiates its rates and rate changes. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103. These rates are, however, subject to Commission review, and Section 4(e) of the Act expressly imposes upon the seller the burden of proving the justness and reasonableness of increased rates on such review:

> * * * At any hearing involving a rate or charge sought to be increased, the burden of proof to

[12] Section 4(e), *infra*, App. A, pp. 48-49, provides that "the Commission shall give to the hearing and decision of such [increased rate] questions preference over other questions pending before it and decide the same as speedily as possible."

> show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *.

Tennessee here attempted to justify its increased rates (and thus meet its burden of proof) by showing an overall cost of service which included a return computed at a rate of 7 percent per annum on its claimed net investment. However, it failed to justify more than a rate of 6⅛ percent, the difference amounting to about $11 million a year. If the indicated $11 million reduction in rates had to await decision of all of the other issues necessary to the fixing of just and reasonable rates, it could not have been prescribed by the interim order of August 9, 1960, which was issued some four months after the increased rates had gone into effect (subject to refund). Indeed, it could not have been ordered for many times four months thereafter; the complexity of the other cost-of-service issues and the intricate problems involved in allocating costs of service among zones made it unavoidable that the rate case, viewed in its totality, would be lengthy.

In these circumstances, the Commission properly concluded that consumer protection against excessive rates required something more than the issuance of an order prescribing just and reasonable rates at the distant end of the entire rate case. The agency had been given general powers to meet such needs; it had previously issued interim rate orders to meet similar demands; and such orders had uniformly been upheld by the courts.

The general power to meet such needs is granted by Section 16 of the Act, 52 Stat. 830, 15 U.S.C. §717o, which provides in part:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders * * * as it may find necessary or appropriate to carry out the provisions of this Act. * * *

Among the most important provisions of the Act "to be carried out" by the Commission,[13] as the courts have repeatedly stated, are those designed to protect consumers against excessive rates. Sections 4(a), 4(b), 4(e), and 5(a), *infra*, pp. 47, 48–50. This Court has spoken of consumer rate protection as the "primary aim of the Natural Gas Act" (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147) and the "overriding intent of the Congress" (*Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378, 389). At the same time, it has emphasized (*id.* at 388) the breadth of the powers given the Commission to provide that protection:

> * * * The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. * * *

Thus, the provision of Section 4(e) relating to rate increases pointedly places the burden of proof on

[13] As this Court has made clear, the rate standards of the Act are to be administered by the Commission, not the courts, in the first instance. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251–252.

the company and gives priority to Commission disposition of these matters.

In this case, the time which the Commission foresaw would be required to reach a final decision on all of the other issues would have meant a prolonged delay in affording protection to the consumer against Tennessee's exaction of a clearly illegal rate of return. The dollar amount of the reduction which turned on the rate-of-return issue was plainly of sufficient moment to justify the procedures involved in giving immediate effect to the Commission's determination. The protection which would have been afforded by the only alternative (refund) would have been much less satisfactory, for the reasons discussed *infra*, pp. 32–34. In such circumstances, to remain inactive would not "carry out" the Commission's statutory role; to allow Tennessee to continue to collect a 7 percent rate of return after its illegality was demonstrated would fail to provide "protection of consumers against excessive rates"; to try to decide *all* of the issues before making *any* reduction would miss "the primary aim of the Act." Since an immediate *pro tanto* reduction was clearly appropriate, the Commission had power to order it under Section 16.

2. The court of appeals has read the Act narrowly—as one authorizing the Commission only to make final determinations prescribing just and reasonable rates. Section 4(e), to be sure, authorizes the Commission to "make such orders with reference [to the changed rate] as would be proper in a pro-

ceeding initiated after it had become effective." *Infra*, App. A, p. 49. This provision permits the Commission to do what it could do under Section 5(a) of the Act, *infra*, App. A, p. 49, which states that if the Commission finds a rate to be "unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate * * * to be thereafter observed and in force, and shall fix the same by order * * *." But in a Section 5(a) proceeding, the Commission may take intermediate steps before resolving all questions which must be decided in order to fix just and reasonable rates; it can promptly effectuate a *pro tanto* reduction based on the company's failure of proof in particular respects. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583–585. In any event, although the procedure outlined in Section 5 may be followed in a proceeding under Section 4, there is no obligation to pursue it.[14] Section 16, as pointed out above, explicitly grants the Commission authority to enter such other orders as may be necessary or appropriate to carry out the basic statutory purposes.

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[14] Compare *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 688–690. There, this Court held that under Section 15(7) of the Interstate Commerce Act—the suspension and hearing provisions upon which Section 4(e) of the Natural Gas Act is based—the Interstate Commerce Commission was not obliged to determine proportional rates although the section provided, as here, that the Commission *might* make such orders in suspension proceedings as would be proper in a proceeding initiated after the rate had become effective.

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In holding that, in the absence of a Commission decision on cost allocations, there was "no basis for determining which of the filed rates in specific zones were unlawful" (R. 642), the court below misconceived the test of validity applicable to an interim order. For the test is not whether there can be a resolution of all questions which relate to the lawfulness of the rate but whether the sufficiency of the attempted justification of a component part of the increased rate can be decided separately. The decision below fails to recognize that pipeline rates, whether company-made or Commission-made, need not be regarded as indivisible entities, but may realistically be treated as aggregates of severable components. Their nature was aptly described in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 163 F.2d 433 at 450 (C.A.D.C.):

> * * * Our law has never provided that either a company, a commission, or a court can fix a price for a utility commodity or service by an abstract observation or by a comparative evaluation of current prices for other commodities or services, or by any such process. The character of the rate has always been determined, in our law, by its relationship to the sum of a number of components.

Indeed, Tennessee, as a part of the filing of its increased rates here, was required by Section 154.63 of the Commission's regulations, 18 C.F.R. 154.63, to include a full and detailed account of the manner in which it had derived the increased rates which it proposed to charge. This included disclosure of all components of its claimed cost of service, such as

cost of purchased gas, labor, taxes, depreciation, return on investment and allocation of costs between jurisdictional and nonjurisdictional business and among zones and classes of service. Return on investment, in turn, is derived by determining a fair rate of return and applying that rate to net prudent investment, after making appropriate deductions for accrued depreciation. It follows that if, upon hearing, the company's justification of one component fails, the increased rates are, to that extent, unsupported and need not be allowed by the Commission.[15] To that extent, the burden of proof which Section 4(e) imposes on the company—a burden, in this case, of justifying the rates in each zone—has not been met.[16]

3. In prior instances where it has appeared that the proof failed to support, in whole or in part, the rates under investigation, the courts have approved the Commission's use of measures similar to the interim order

[15] The court below (R. 642), as well as the petitioners in that court (respondents here), sought to rely upon a Commission order in an earlier Tennessee rate proceeding, in which the Commission denied Tennessee's request to fix rates prior to a determination of the zone allocation issue. See *Tennessee Gas Transmission Co.*, Docket No. G-5259, order issued September 20, 1956 (unreported), *infra*, App. B, pp. 52-61. But for the Commission to have granted Tennessee's request there would have been to purport finally to fix just and reasonable rates without hearing on, and justification of, the allocation of cost of service, *i.e.*, to prescribe partially unjustified increased rates, and not, as here, partially to disallow increased rates for failure to justify that part.

[16] As earlier noted, the substitution of 6⅛ percent for the 7 percent rate-of-return figure utilized in Tennessee's computations produces the substitute interim rates which are now in effect.

at issue in the present case. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583–585; *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, 236 F. 2d 606 (C.A. 3); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 715–716 (C.A. 8), certiorari denied, 346 U.S. 922; *cf. New England Divisions Case*, 261 U.S. 184, 199–201; see also *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 121 F. 2d 159 (C.A. 8); *Episcopal Theological Seminary* v. *Federal Power Commission*, 269 F. 2d 228 (C.A.D.C.), certiorari denied *sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895.

In *Federal Power Commission* v. *Natural Gas Pipeline Co., supra*, this Court affirmed an interim reduction of rates pursuant to a Section 5(a) investigation. It held (315 U.S. at 584) that a company which had presented its entire direct testimony in support of its rates could not complain that it had not yet been able to examine Commission witnesses on aspects of the case which, for purposes of the interim order, the Commission had decided on the basis of the company's presentation.

In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra*, like this one a case arising under Section 4 of the Natural Gas Act, the Commission eliminated a portion (approximately $5,000,000 annually) of Panhandle's increased rates after the company had presented its case in chief. In taking this action, the Commission relied on its disallowance of the same components in the preceding *Panhandle* rate case and pointed out that no new or supervening

occurrences had been shown to warrant reconsideration of the Commission's recent decision. The Third Circuit, rejecting Panhandle's contention that no reduction could be ordered until all phases of the case had been resolved, held that a company which fails to make out a prima facie case in support of its cost of service is not entitled to continue collection of the unproved portion of its rates. The court pointedly observed (236 F. 2d at 608):

> * * * Panhandle must have based its claim for a higher rate of return upon justification existing at the time of filing. It is difficult to see how else a change could have been proposed in good faith. True, in recognition of the time involved in these often long drawn out rate proceedings, the commission quite properly permits the basic showing of the justification which existed at the time of filing to be supplemented by evidence of occurrences since filing. But this is far from saying that a party who tries and fails to make a prima facie showing to support severable elements of his claim is entitled to a postponement of adjudication thereon in anticipation of possible new justification which some future event may supply before the overall case can be completed.
>
> Here the record shows that Panhandle was given full opportunity to offer all of its evidence in support of the items which the commission disallowed in the order now on appeal. Thereafter, the commission was under no obligation to postpone its ruling on those matters. Indeed, to have done so would have permitted Panhandle to put into effect, albeit under bond and subject to possible future refund, increased

> rates, parts of which it had attempted and, in the commission's view, failed to justify.

In the *State Corporation Commission* case, *supra*, the Eighth Circuit affirmed the Commission's interim reduction of increased rates filed by Northern Natural Gas Company to reflect the disallowance of $7,601,853 of the company's claimed cost of service. As in the *Panhandle* case, the portion disallowed consisted of components which the Commission had rejected in Northern's preceding rate case and as to which the Commission found, after presentation of Northern's affirmative case, that no intervening changes had been shown warranting different treatment. In approving the Commission action, the court stated (206 F. 2d at 716):

> * * * It is evident from the record therefore, that if the Commission had allowed the $7,601,853 items to remain pending in Northern's third rate increase schedule the [preceding] Orders disposing of the same items would have been practically nullified. Northern's proposal was to continue indefinitely to charge its customers on the basis of its disallowed increase of $7,601,853, regardless of adverse decision upon it by the Commission. Its position for aught that appears would justify its continuing the same course, notwithstanding judicial affirmance of the Commission. We do not think the statute can be construed to permit such a course of procedure by Northern.

Here, rather than reinstating the rates which had been in effect prior to the disallowed increased rates (as was done in the *Mississippi River Fuel Corp.* and *Episcopal Theological Seminary* cases, cited *supra*,

p. 22), the Commission permitted Tennessee to file substitute increased rates predicated on a total cost of service which included a 6⅛ percent rate of return, but otherwise based on Tennessee's original presentation (the course followed in the *State Corporation Commission* and *Panhandle Eastern* cases, *supra*, p. 22).[17]

B. The presence of an unresolved allocation issue does not curtail the Commission's interim order powers

Respondents argue that cases upholding interim rate orders are inapplicable because there is an unresolved issue in this case as to the allocation of the company's total costs. We disagree with this conclusion.

The contention is that, because of the allocation issue, there is a possibility that Tennessee may not be able to recoup, for the refund period, its full cost of service as found by the Commission. That possibility[18] stems from the fact that conceivably the Commission might so decide the zone allocation issue and the remaining cost of service issues as to allow rates for customers in some of Tennessee's six rate zones higher than the interim rates now being charged, even though the over-all rates prescribed would pro-

[17] Since the Commission proceedings had at that time been concluded only with respect to the rate-of-return issue, these substitute rates were to go into effect, subject to refund, as of the date the disallowed rates had become effective, *i.e.*, April 5, 1960.

[18] However, as we indicate below, pp. 40-41, Judge Wisdom, speaking for the court below, did not have a sound basis for his view that the retroactive application of the cost allocation decision would make "it highly unlikely, if not impossible, for a utility to earn a 'just and reasonable return.'"

duce less total revenues than the interim rates. If that were to happen and refunds were to be ordered on the basis of such rates, Tennessee might not recoup a return of 6⅛ percent because it would not be able to collect retroactively the higher rates found proper for some zones although it would be required to make full refunds in the other zones.

As the Commission pointed out (*supra*, p. 6), however, Tennessee's risk is no greater than it would have been if its increases had originally been predicated on a proper rate of return, *i.e.*, the 6⅛ percent rate determined by the Commission and unanimously approved by the court of appeals. The possibility that Tennessee's method of allocation may have caused it to propose lower rates in some zones than the Commission might subsequently allow in no way vitiates the validity of the interim rate reduction order. For such a risk exists in every rate case, even where all issues are decided simultaneously.[19] As Chief Judge Tuttle cogently observed in his dissent (R. 646):

> * * * Tennessee stands in no different position than if the Commission, after the section 4 hearing, decided that Tennessee was entitled to an overall return of 7 percent on its investment, just as asked for by Tennessee, but decided that the cost allocations between the several zones were discriminatory, as here claimed by Columbia. * * * In such a situation Tennessee would not realize the full per-

[19] Indeed, Judge Wisdom recognized (R. 642–643) that such a risk would exist even if the company's claimed cost-of-service were allowed in full.

mitted rate of return because it would have failed to substantiate the correctness of the cost allocation.

Thus the risk that Tennessee runs, and on which the opposition to the interim order rests, is not attributable to the interim order but inheres in the nature of the allocation issue. To be sure, if a company has been using impermissible methods of allocating its costs and has thereby discriminated among customers located in different areas, the Commission might be obliged to fix higher rates for particular zones (although a more likely outcome might be the fixing of *lower* rates for other zones) than those which the company has been collecting during the pendency of the rate proceeding. But that is a company risk—not one against which its customers should be required to furnish insurance by paying excessive charges.

The crucial consideration, as urged above, *supra*, pp. 15-21, is that under Section 4(e) the natural gas company has the burden of justifying the increases for which it has filed. The interim order is merely a prompt method of assessing the result of a failure to bear that burden. The opinion of Judge Wisdom (R. 643) erroneously assumes that the Commission, in finding that it would be proper for a company to earn a particular rate of return, guarantees that such a return will be earned. To the contrary, the Commission's conclusion as to the propriety of a particular rate of return means only that such a return was deemed proper on the basis of a test year and that rates designed to produce such a return in the future

are permissible.[20] As the Commission notes (R. 536), the company certainly cannot complain if the Commission orders that it discontinue collecting revenues which it has not justified on the basis of its own theory and evidentiary presentation.

Respondents also err in their attempt to distinguish the earlier interim order cases on the ground that no issue of zone allocation remained open there. In fact, the interim orders in the *State Corporation Commission* and *Panhandle* cases, *supra*, p. 22, did not preclude determination of final rates by the Commission on different allocation bases than those used by the company in fixing its interim rates.

In the *State Corporation Commission* case, the interim order affirmed by the court had been issued by the Commission in F.P.C. Docket No. G-1881. See *Northern Natural Gas Co.*, 11 F.P.C. 278 (Commission Opinion No. 233). In that proceeding, the Commission disallowed substantial portions of the company's increased rates because they were based on contentions that had been rejected by the Commission 75 days earlier in dealing with Northern's rates for earlier periods. See *Northern Natural Gas*

[20] Rates designed to recoup a particular estimated cost of service may, in fact, yield revenues which are either higher or lower than the actually experienced cost of service depending on such factors as the realization of estimated sales volumes, and changes in labor and material costs to levels other than those estimated. If the revenues realized are less than those anticipated, the company has no right to demand retroactive compensation for that reason, while the natural gas consumer can obtain no reparations if the actual revenues exceed either estimated costs or revenues.

Co., 11 F.P.C. 123 and 375 (F.P.C. Docket Nos. G–1382 and G–1533, Opinions No. 228 and 228–A). The Eighth Circuit, in the same opinion in which it affirmed the interim order, approved this prior Commission decision in most respects, but nonetheless set it aside for inadequate findings on rate of return. While the Commission, in issuing its opinion in the earlier proceedings, had found that the evidence presented by various parties to support zone rates for Northern's system was insufficient, nevertheless it specifically indicated, as noted by the court (206 F. 2d at 712), that the zone question could appropriately be reconsidered in the then pending Docket No. G–1881 proceeding in which the interim order was later issued. 11 F.P.C. 123 at 140.

The question of zone allocations thus was a very live issue in the Commission proceeding in which that interim order was issued. Moreover, nothing in the interim order (11 F.P.C. 278 and 1324) even suggests that zone rates sought by various interveners might not be ordered in the second phase of the proceeding and be applicable in the refund period.[21] Although

[21] Following the action of the Eighth Circuit setting aside the Commission's Opinion 228 on the ground that the findings were insufficient to support the rate of return allowance (206 F. 2d at 723), the rate proceedings involved in the interim order, as well as the two earlier dockets, were settled by the parties, with Commission approval. *Northern Natural Gas Co.*, 13 F.P.C. 1518. Accordingly, the zone question was not resolved until subsequent rate proceedings, when Northern was required to have zone rates. See *Interstate Power Co.* v. *Federal Power Commission*, 236 F. 2d 372 (C.A. 8), certiorari denied, 352 U.S. 967. In that later proceeding the parties agreed to make new zones effective prospectively only. See *Northern Natural Gas Co.*, 13 F.P.C. 773, 774.

respondents' precise contentions were not made in attacking the interim order, it is apparent that the *State Corporation Commission* case involved the same risks to Northern that Tennessee complains of here.

Similarly, the Commission's interim rate reduction order in the *Panhandle case* (236 F. 2d 606, C.A. 3), *supra*, did not preclude adjustments, in the second phase of the proceeding, which could result in rates higher than the interim rates. For while the Commission there concluded that Panhandle had not made out a case in support of certain changes in allocation and rate design methods, the interim order did not foreclose other parties to the proceeding from showing that the allocation and rate design that underlay Panhandle's interim rates should be modified. Quite aside from zone allocation issues, moreover, the court's opinion in the *Panhandle* case indicates that the company's contentions in that case were similar to Tennessee's here. As here, the company was urging that it should be allowed to continue collecting rates that it could not justify because rates at the same level might eventually be justified on the basis of evidence presented by other parties or because of changed circumstances.

Indeed, it is invariably true that the "other issues" (there are, of course, many issues in a typical rate case) which remain whenever the interim order procedure is invoked might conceivably result in an offset even if there were no allocation issue, *i.e.*, the rate proponent might be able to prove that, although some elements in the cost of service accepted by the Commission for the purposes of the interim order were

overstated, others were underestimated, with even large dollar effect. This could occur even in a Section 5(a) proceeding such as was involved in the *Natural Gas Pipeline* case, *supra*. In that event, the company would collect less from all of its customers during the period between the interim order and the later order than might ultimately be found just and reasonable with respect to that period, with no possibility of collecting such higher rates retrospectively. This the presence of an unresolved allocation issue does not distinguish this case from the earlier interim order cases.

Moreover, it is clear that questions of cost allocation loom as potential issues in virtually every major pipeline rate case. If interim rate reduction orders were to be limited to cases in which allocation issues could not be raised by any party in the later phases of a proceeding, the procedure could never be utilized, regardless of how excessive a pipeline's cost of service claims might be, and the holdings of the *State Corporation Commission* and *Panhandle* cases could not be justified.

As both the earlier cases and the situation here show, the interim order procedure is a useful and important tool in the Commission's disposition of proceedings involving increased rates. Public utility

[22] It also appears that the Interstate Commerce Commission's failure to fix specific divisions in the *New England Divisions Case*, 261 U.S. 184, would have prevented carriers, if the resulting divisions were upset by the Commission, from collecting their fair share prior to the date of a new commission order. See *Brimstone Railroad Co.* v. *United States*, 276 U.S. 104.

rate proceedings are almost invariably complex and protracted, involving many parties and numerous difficult issues. Some of these issues, if severed, may be heard and determined more quickly than others. For it may be possible to decide some issues on the basis of prior decisions involving the same company or comparable questions of law, or on the basis of a relatively brief presentation of expert testimony. In contrast, other issues characteristically require extensive preliminary study and investigation by lawyers, engineers and accountants as well as lengthy and elaborate presentation at the hearing. As a result, the final resolution of all issues in a rate proceeding may take many additional months even though every effort is made by the Commission to expedite the case. To require all issues to be decided simultaneously would mean that rates based on clearly excessive claims must remain intact during the interim. It would thus impair Congress' purpose in providing that increased rate questions shall be decided "as speedily as possible" and its object of relieving the ultimate consumer of the burden of excessive pipeline charges.

C. Provision for refund is not a satisfactory substitute for interim rate reduction

The decision below seems to rest in large measure on the erroneous view that consumers are adequately protected, although they continue to pay excessive rates, by the pipeline's ultimate obligation to refund excess charges with interest. But refund provisions, like stays *pendente lite,* are by no means a satisfac-

tory substitute for the interim reduction of excessive rates. The courts' experience with the disposition of funds impounded as a result of judicial stays of Commission rate-reduction orders provides ample proof of this.[23]

The consumer who bears the burden of excessive rates is not afforded full protection. For in today's mobile society, the consumers of natural gas who pay excessive rates in a given area today are scattered as the months go by. And it is our understanding that it is seldom feasible for distribution companies to refund excess amounts collected to the particular consumers who paid them. Rather, the refunds, either by a direct payment or credit on current bills spread over a period of months, are given to those consumers who are purchasing gas at the time of the refunds and on the basis of their current purchases. Moreover, for the ordinary consumer, even if he does not move, an immediate increase in his cost of living cannot be presumed to be offset by the prospect of receiving repayments some-

[23] The complexities and inadequacies of refunds seldom are reflected in the reported decisions but the reports relating to the refunds which followed the affirmance of the Commission's order in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, are suggestive. A series of orders (all in *Natural Gas Pipeline Co.* v. *Federal Power Commission*, C.A. 7, No. 7454) are reported at 128 F. 2d 481, 129 F. 2d 515, 131 F. 2d 137, 134 F. 2d 263, 141 F. 2d 27. This Court dealt with the disposition of those impounded funds in *Central States Electric Co.* v. *City of Muscatine*, 324 U.S. 138 and 325 U.S. 836. See also the diverse opinions with respect to refunds in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577.

time in the future. *Cf. Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707–708.

There is another important consideration. Natural gas is in competition with other fuels for industrial, commercial, and domestic consumers. As a consequence, the maintenance of excessive rates, albeit subject to refund, may prevent local distributing companies from attracting new customers and, by the same token, prevent such potential customers from using natural gas. Since the decision as to which fuel is to be utilized involves substantial investment—for example, in space-heating equipment or in air conditioning units—the loss of customers to other fuels because of an excessive price would tend to be permanent and could not be remedied by later refunds. Refunds to commercial and industrial consumers, of course, can never restore to them the business opportunities and competitive advantages lower fuel costs might have given them at the time they had to pay the excesses.

The structure and language of the Act show that Congress was well aware of the imperfect nature of the refund protection for customers. This is demonstrated in the first instance by the fact that the rate proponent can put a new rate into effect only after thirty days' notice and then only if the Commission does not suspend such a rate's effectiveness for a further period of five months. If the refund provisions had been considered a full equivalent of early reduction of excessive rates, there would have been no occasion to provide for a suspension or notice period.

The origin of the refund provisions in section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), upon which Section 4(e) of the Natural Gas Act was modeled (see *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C.A. 4), shows, indeed, that the suspension provision was the primary *consumer* protection provided by that section, while the refund provision was added principally to protect the *carrier*. The suspension provision of the Interstate Commerce Act (49 U.S.C. 15(7)) was added in 1910 because reparations were deemed an inadequate remedy for the shipper.[24] See 1 Sharfman, *The Interstate Commerce Commission* (1931), pp. 58–60, 201–202; Interstate Commerce Commission, Twenty-first Annual Report (1907), pp. 9–10. The Interstate Commerce Act was thereafter amended to reduce the maximum suspension period to five months and to permit increased rates to become effective subject to refund provisions, before the end of the rate investigation. Section 418(7) of the Transportation Act of 1920, 41 Stat. 456, 486, as amended, 49 U.S.C. 15(7). These modifications were adopted because it was recognized that, particularly in a period of rising costs, an unduly long suspension period gave inadequate protection to the carrier, which would be unable to collect higher rates retroactively even though it were later found that the filing had been justified. See Hearings before House Committee on Interstate and Foreign Commerce on H.R. 4378, 66th Cong., 1st

[24] The 1910 amendment permitted suspension for a total of ten months.

sess., pp. 30–32; MacVeagh: *The Transportation Act, 1920* (1923), pp. 371–380; 1 Sharfman, *op. cit.* at pp. 201–202; *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C.A. 4). During these hearings, it was recognized, however, that the refund provision would afford little more protection to the shipper and his customers than the reparations remedy previously found inadequate. This history shows a legislative attempt to accommodate competing interests but certainly evinces no belief that either refunds or reparations represent a fully adequate substitute for measures which prevent excessive rates from being collected in the first instance. See Hearings on H.R. 4378, *supra*, at pp. 30–32, 1627; Hearings before Senate Committee on Interstate Commerce on the Extension of Tenure of Government Control of Railroads, 65th Cong., 3d sess., Vol. 1 at 512.

II. THE COMMISSION'S INTERIM REDUCTION ORDER WAS A REASONABLE AND APPROPRIATE EXERCISE OF ITS STATUTORY AUTHORITY

The suggestion in the opinion below (R. 643) that, regardless of the Commission's authority to issue an interim order, it was an abuse of discretion to issue the order before deciding a pending allocation issue "ripe for decision" is also in error.

A. The allocation issue was not ripe for Commission decision

Judge Wisdom's opinion assumes that at the time the Commission required the interim reduction, it was in a position to decide the zone allocation issue. In fact it was not. To be sure, when the interim order

was issued on August 9, 1960, the examiner had heard all of the evidence on the matter of zone allocation in the related Tennessee rate case (covering a prior period, F.P.C. Docket No. G–11980). Moreover, he had stated (see, *supra*, p. 5, n. 5) that his decision on the zone allocation issue in that earlier rate case would also be applicable in this case. Nonetheless, the matter was not ready for Commission decision. The zone allocation issue in No. G–11980 had produced 4,500 pages of transcript (presented on more than 30 hearing days) and some 60 exhibits. The interests of more than ninety interveners were involved. Final briefs had been filed with the examiner on April 11, 1960. When Tennessee on July 19, 1960, moved to omit the examiner's intermediate decision, the Commission denied the motion explaining, *inter alia*,[25] that (R. 522–523):

> * * * the nature and considerable size of the record, indicates that it would be more practicable in the interests of an early decision and in the interest of the effective administration of the Natural Gas Act, that the Presiding Examiner, who has available knowledge of that record, should proceed with consideration of the evidence and render decision thereon.

As events developed, the examiner was not able to render his decision, comprising 131 pages of text, until February 13, 1961 (more than six months after the interim order in the instant proceeding). Not until February 6, 1962, a year later, and after two

[25] It also noted the opposition (R. 650–659) of several of the parties to this request and the untimeliness of the motion.

arguments before it, including reargument in September 1961, was the Commission able to render its decision." See *Tennessee Gas Transmission Co.*, decided February 6, 1962, 42 P.U.R. 3d 145, 146, 158. These facts in themselves show that the Commission had good reason, in the interest of expedition, to put its rate of return determination promptly into effect, without either awaiting the examiner's zone allocation decision or attempting to decide that issue simultaneously with the rate of return question.

Judge Wisdom's assumption that the allocation issue was ripe for decision by the Commission at the time the rate of return question was resolved overlooks the fact that not all issues as to which the taking of evidence has been completed are equally susceptible of prompt disposition. Some issues in public utility rate proceedings may be determined shortly after submission of the evidence. Thus, as in the *State Corporation Commission* and *Panhandle* cases, it may be possible to decide issues with dispatch on the basis of a prior decision involving the same company. Other issues may be decided quickly because of the familiarity achieved by the Commission in dealing with comparable questions of law or fact in other cases. Of course, only the deciding tribunal is in a position to determine what issues in a case it

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Applications for rehearing were denied on April 5, 1962. On June 4, 1962, a petition for review was filed by the Columbia companies challenging this decision. *Manufacturers Light and Heat Co., et al.* v. *Federal Power Commission*, C.A.D.C. No. 17064.

can decide more expeditiously than others. Here, it may be noted, however, that a decision on rate of return involves many comparisons common to the entire industry and that the rate of return for two other natural gas pipelines had been determined by the Commission earlier in 1960, not long before the interim order deciding the rate of return issue here. See *Manufacturers Light and Heat Co.*, 23 F.P.C. 446, petition for review dismissed *sub nom. Lynchburg Gas Co. v. Federal Power Commission*, 284 F. 2d 756 (C.A. 3); *Southern Natural Gas Co.*, 24 F.P.C. 26.

Other issues, such as the zone allocation issue here involved, may defy rapid disposition despite the best efforts of all concerned. But since the company-made rates necessarily are designed after determining a cost of service made up of severable components, there is no reason for permitting the full amount of such rates to be collected simply because one or more of the many issues in the case cannot be quickly resolved.[27]

B. There is no basis for the holding below that Tennessee would be prevented from earning the fair rate of return during the interim period

For the reasons given above, pp. 25–32, we do not think that the possibility or even the probability that Tennessee might not be able to recoup the entire

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[27] In the *Panhandle* case, *supra*, the interim order, disallowing about five million dollars of the claimed cost of service, preceded by 6½ years the Commission decision on the remaining issues in that case, *Panhandle Eastern Pipe Line Co.*, 25 F.P.C. 787, affirmed in part and remanded in part, C.A.D.C., No. 16583, decided June 30, 1962. The interim reduction constituted about 40 percent, on an annual basis, of the total disallowance ordered by the Commission.

return found proper by the Commission could vitiate the Commission order. Nonetheless, we deem it relevant to point out that, in our view, there was no basis for Judge Wisdom's assumption (R. 643) that the interim order "makes it highly unlikely, if not impossible" for Tennessee, during the refund period, to earn the return found proper by the Commission.[28]

That possibility could come to pass only if Tennessee's rates as finally determined, while resulting in an overall reduction in revenue, should be above the interim rates in one or more zones. There was no reason to assume this would be the case. For, in addition to the allocation question, there still remained the question—raised by both the Commission staff and by interveners—whether other aspects of Tennessee's claimed cost of service, upon which its increased rate filing was also predicated, were not too high. At the time the Commission issued the interim order, Tennessee's increased rates were intended to yield about $75,000,000 more in revenues than the last Commission-approved rates. Even after the interim

[28] Judge Wisdom observed (R. 643), for example, that "Tennessee, therefore, will be unable to earn the return the Commission considers just and reasonable, no matter what the rate is" and that "* * * the retroactive effect of the eventual determination of cost allocation makes it highly unlikely, if not impossible, for a utility to earn a 'just and reasonable return' * * *". Judge Wisdom similarly stated (R. 633) in dissenting from the denial of a requested stay, that "it is unreasonable * * * in this case, for the Commission to specify a rate of return for Tennessee * * * when at the time of issuing the order the Commission knows that there is a likelihood that the company cannot possibly realize the rate of return."

rate reduction order, this figure was still in excess of $64,000,000. This large increase was necessarily based on substantial increases in Tennessee's estimates of various factors in its cost of service. It may be noted that the examiner, in his decision on the second phase of this case, issued on May 28, 1962, determined that Tennessee's cost of service was $25,000,000 less than that for which it had contended.[22] Application of the allocation principles recently announced by the Commission in the other Tennessee case (G-11980) to the examiner's cost of service indicates that the costs allocable to each of Tennessee's six rate zones are less than the revenues Tennessee expected to obtain from it. See, *infra*, App. C, p. 62. Barring wide departure by the Commission from the examiner's cost findings, there will be reductions below the interim rates in every zone and hence no loss of any kind to Tennessee.

III. THE COLUMBIA COMPANIES ARE NOT PREJUDICED BY THE INTERIM RATE REDUCTION

An unusual facet of this case is that one group of *customers*, for quite different reasons from those advanced by Tennessee, suggests that it might be prejudiced—implausible though that seems on the face of it—by the *reductions* which the Commission has

[22] The examiner's cost of service is about $29,000,000 less than the revenues that Tennessee expected the interim rates to generate. It should also be noted that the examiner's cost of service includes in purchased gas costs various amounts still being paid with the possibility of refunds from independent producers.

ordered in Tennessee's charges.[30] The Columbia companies, which purchase gas from Tennessee in some of the latter's zones of service, contend that Tennessee's allocations are highly improper and that Columbia is a victim of discrimination. Columbia then reasons as follows. The Commission could ultimately uphold Columbia's contentions as to allocations and find that Tennessee's increased rates, insofar as they involve the zones in which Columbia purchases, are highly excessive. It might also conclude that [redacted] the rates in certain other zones are unduly low. If these eventualities occurred, substantial refunds would be due Columbia for past periods as a result of the discrimination practiced by Tennessee. But, Columbia says, if Tennessee does not continue to collect from all of its customers sufficient revenues both (*a*) to provide it an over-all rate of 6⅛ percent and (*b*) to make whole those customers which have been overcharged, Columbia may suffer. This argument assumes, of course, that the Commission is guaranteeing Tennessee a 6⅛ percent rate of return for past

[30] In large measure, the interest of Columbia is that of a stakeholder. The three Columbia companies that are parties to this action increased their jurisdictional rates to reflect Tennessee's increased rates, and settlements with respect to each of the Columbia companies' present rates specifically provide for refunds to its customers of refunds from Tennessee for the period from April 5, 1960, on. See *Manufacturers Light and Heat Co.*, 25 F.P.C. 595, 599; *Ohio Fuel Gas Co.*, 26 F.P.C. 213, 216; *United Fuel Gas Co.*, ordered issued March 20, 1962. It is notable that consumers who receive Tennessee gas transmitted by Columbia support the Commission's interim reduction. See the briefs filed by City of Pittsburgh, petitioner in No. 50, and the Commonwealth of Pennsylvania, as *amicus curiae*.

periods, even if it should develop that Tennessee has failed, as a result of its own acts of gross discrimination, to collect from proper sources sufficient revenues to yield the designated rate of return. Putting aside the point that there appears to be no reasonable probability that this situation will ultimately be presented, there is no warrant for the assumption that the Commission would permit the victim of discrimination, rather than its perpetrator, to suffer the burden.

Columbia also appears to be of the view that the Commission's interim reduction order somehow deprives it of a hearing on the question whether Tennessee's rates in certain zones should be reduced upon grounds of discrimination. We turn first to this threshold contention.

A. The interim reduction left opportunity for hearing unimpaired on all issues other than rate of return

The claim of Columbia that it has been deprived of a hearing on the zone allocation issue seems to assume that a final determination has been made as to Tennessee's rates during the refund period. But an examination of the orders under review plainly shows that the contrary is true and that the order requiring immediate reduction of Tennessee's rates did not prejudge the allocation issues. For while the effect of the Commission order was to require Tennessee to file substitute increased rates reflecting the lower 6⅛ percent rate of return, the substitute rates were to be in effect for the same period as the originally filed rates would have been and are subject to the same refund obligation under Section 4(e) of the Act. Spe-

cifically, the Commission in paragraph (C) of the ordering paragraph of the order under review, stated (R. 539):

> (C) Upon acceptance of such filing of substitute rates as satisfactory to the Commission, the rates, charges and classifications set forth in Tennessee's substitute tariff sheets shall become effective as of April 5, 1960, subject to refund, in accordance with the Commission's order of April 29, 1960, and the undertaking heretofore filed by Tennessee, in compliance with the terms of that order, and subject to further orders of the Commission in this proceeding.

As the Commission observed (R. 536), the interim reduction order leaves Columbia in the same position as if Tennessee originally had filed increased rates based on the 6⅛ percent rate of return approved by the Commission. By filing increased rates and putting them into effect subject to refund, Tennessee subjected itself to making refunds to the extent these rates should ultimately be found not justified—whether this finding results from a determination that the over-all cost of service is excessive or that the resulting rates are unduly discriminatory or preferential. The claim that Columbia has been deprived of a fair hearing on the zone allocation issue was not adopted below and is frivolous.[31] As Chief Judge

[31] Contrary to the view expressed in Columbia's brief in opposition (pp. 7–8), we have found nothing in Judge Wisdom's opinion adopting the Columbia position. Indeed, his opinion clearly shows that, in setting aside the interim order, he was concerned only by the possibility of "injury" to Tennessee.

Tuttle noted (R. 645) in dissent, the Columbia companies "are undoubtedly entitled to such a determination, but not necessarily before the Commission can eliminate what it finds to be an unlawful increment in the price structure. * * *"

B. It is not necessary to continue excessively high rates in order to preserve power to correct discrimination

Columbia's argument that the interim reduction would cause it economic injury depends, in the first place, on a series of speculations and unwarranted assumptions. It assumes, of course, that the rates finally approved by the Commission will exceed the interim rates in zones where the Columbia companies are not customers of Tennessee. We have already shown that this is unlikely (*supra*, pp. 39-41). Even if the Columbia allocation methods were accepted, the prospect that any of the final rates would exceed the interim rates is conjectural at best, particularly in view of the large portion of Tennessee's cost of service which has been disallowed by the examiner. See, *supra*, p. 41.

But should these eventualities nonetheless occur, the apprehended injury to Columbia would result only if it were also correct in suggesting that Tennessee cannot, and will not, be required to make full refunds at the conclusion of the entire rate proceeding. Certainly, the Commission's determination that a 6⅛ percent (as opposed to a 7 percent) rate of return is proper does not carry with it a guarantee that Tennessee must in all events be permitted to retain revenues affording that rate of return for the

interim period. Tennessee is entitled to charge lawful rates which will yield it a lawful rate of return. It obviously does not follow that it is entitled to collect and retain discriminatory rates merely because they yield, on the average, such a return. In short, the Commission's determination as to the permissible rate of return nowise inhibits it from directing that refunds be made to those who may have been unlawfully overcharged by reason of discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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AUGUST 1962.

APPENDIX A

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

* * * * * *

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification,

or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine

the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for pub-

lic inspection and examination during reasonable business hours.

* * * * * *

SEC. 19. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive * * *

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APPENDIX B

United States of America Federal Power Commission

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline

Docket No. G-5259

IN THE MATTER OF TENNESSEE GAS TRANSMISSION COMPANY

ORDER GRANTING MOTION IN PART

(Issued September 20, 1956)

By order issued on October 6, 1955, herein the Commission directed that the evidence first to be thereafter presented at further sessions of the hearing should be confined to the total cost of service of Tennessee Gas Transmission Company (Tennessee) and to the rate level. It also provided that, thereafter, the Presiding Examiner should allow such period of time as might be necessary for the preparation of evidence to be offered in connection with the zoning issue; and that the latter evidence should be presented at a separate and subsequent phase of the hearing.

Upon conclusion of the non-zoning phase of the hearing on July 19, 1956, Tennessee moved orally upon the record that the Commission:

(1) Proceed to final decision on the issues relating to total cost of service and rate level,

with an order to be issued fixing Tennessee's rates for jurisdictional sales on and after December 15, 1954 (the commencement of the refund period herein), and continuing until the effective date of any Commission order subsequently issued on the zoning question;

(2) Omit the intermediate decision procedure and fix dates for the filing of briefs on the issues as to total cost of service and rate level; and

(3) Set a date for the commencement of a separate phase of the hearing herein on the zoning issue.

Tennessee alleged in support of the motion that:

(a) This proceeding involves a rate increase filed by Tennessee on November 3, 1954, the sole purpose of which was to reimburse Tennessee for increases in the cost of gas purchased from its suppliers pursuant to effective rate schedules, which the Commission had permitted to become effective without suspension. The new rates added such increased gas-purchase costs to the settlement rates effective pursuant to the order issued September 11, 1954, in Docket No. G-2434, and, as thereafter modified, effective November 18, 1954. Tennessee proposes to obtain such reimbursement by increasing the commodity component in all sales rate schedules by 1.9¢ per Mcf.

(b) The purpose of the motion is to effectuate the provisions of the order issued October 6, 1955, by expediting a final decision on the issue of the total cost of service and rate level.

(c) The Commission is prohibited by section 5(a) of the Natural Gas Act from ordering an increase in the currently-effective rates on file with the Commission. This limitation is equally applicable to this proceeding instituted under section 4(e) of the Act. Thus, in this proceeding, the Commission's order following the phase of the hearing on the zoning issue, if the Com-

mission were to adopt new zone rate differentials which required an increase in the presently-filed rate in any zone, could not be effective for any period prior to the effective date of such order.

The motion has been certified to the Commission by the Presiding Examiner in accordance with the Commission's Rules of Practice and Procedure.

At the July 19 session of the hearing, counsel for the numerous interveners present requested an opportunity to file written answers to the motion. Because of the importance and complexity of the issues raised by the motion, the Presiding Examiner granted the request, and fixed July 30, 1956, as the termination date for the filing of answers. The Presiding Examiner afforded Tennessee opportunity until August 6, 1956, to file a reply to such answers.

Answers to the motion of Tennessee were filed by a number of interveners and Staff Counsel. Thereafter, Tennessee, on August 6, 1956, filed its reply.

The answers of the interveners, in the main, objected to the motion in its entirety. It is asserted that the Commission's authority in this proceeding is to determine after full hearings whether or not the increased rates and charges of Tennessee are unjust or unreasonable or unduly discriminatory or preferential; and, if it so finds, to determine the just and reasonable rates and charges to be thereafter observed and to fix such rates and charges by order.

As to the period preceding the date of such order, it is asserted that the Commission's authority is to direct refunds of any portion of any collected rates and charges found not justified. The Commission cannot fix a rate from December 15, 1954, onward to recover Tennessee's overall cost of service—so the argument runs—until the Commission has considered

and passed upon the issue of zone differentials and is able to determine not only what the overall cost of service should be, but is also able to determine what are just and reasonable zone rates. It appears that the majority of the interveners fear that the motion, if granted, would deny them refunds to which they might otherwise be entitled.

All the interveners—save the Columbia Gas System companies—object to the request that the intermediate decision procedure be waived. Staff Counsel objected to the request for the omission of the intermediate decision procedure only.

In reply, Tennessee asserted that it would be inequitable and unreasonable to prescribe rates and charges and rate differentials to be effective retroactively which would be different than the historic zone differentials so as to deprive Tennessee of revenues equalling its total cost of service.

The pleadings pose the questions of whether it is appropriate and in the public interest for the Commission at this time and on the present record to consider and determine separately the issues relating to total cost of service and rate level and to reserve for subsequent decision the issue raised concerning zone rate differentials; and should the intermediate decision procedure be omitted.

At the outset of our discussion, we take note that the record is ripe for decision as to Tennessee's total cost of service for the test period. Tennessee and all other parties, including the Staff, have been fully heard on this issue. The pleadings inform us also that there are in this record several different estimates of Tennessee's cost of service. These have been presented by Tennessee, the Staff, and a group of interveners.

We take particular note also of the fact that none of the parties appears to suggest that the Commission or the Presiding Examiner—if the intermediate decision procedure is not waived—may not in the present posture of the proceeding proceed to a decision upon the total cost of service. To the contrary, certain of the interveners urge that a decision now be made on this point.

Decision at this time as to Tennessee's cost of service would apprise all parties of the proper costs to be allocated. Accordingly, such a decision now should facilitate preparation of evidence to be presented in the further hearings to be had herein on the zoning issue. It would avoid presentations on different bases by different parties and should tend to simplify and shorten the record on the issues remaining to be heard. All of which should serve to expedite the hearing and decision on the zoning issue.

In consideration of the foregoing and in the particular circumstances of this case, we conclude that Tennessee's motion should be granted to the extent that it requests a determination now as to its proper total cost of service for the test period.

Resolution of the question of whether it is appropriate and in the public interest for us at this time and on the present record also to consider and determine separately the issue relating to rate level (i.e., to fix Tennessee's rates from December 15, 1954) and to reserve for subsequent decision the issue raised respecting zone rate differentials presents more difficulty. In this connection, we note that in the order issued herein on October 6, 1955 we found "that the question of possible unlawful rates between zones is a relevant issue in a rate proceeding." There, we said that:

> The zone boundaries and rate differentials between the zones served by Tennessee have not been prescribed by a Commission order but have been carried only in the rate schedules filed by Tennessee. In a system as complex as that operated by Tennessee the charges of unjustness in the rates as between zones require a thorough and exhaustive study to determine proper zone boundaries and what method of allocating costs between zones would be fair and equitable to all concerned, in order that just and reasonable rates may be prescribed for each zone.
>
> By reason of the peculiar circumstances in the present case, the question of zone rates may reasonably be separated for hearing purposes from the question of the cost of service involved in the balance of this rate proceeding. It seems appropriate, therefore, to separate the zoning issue from the pending rate proceeding, allowing the interested parties sufficient time to prepare the evidence in the zoning case.

Accordingly, the order provided for a date for resumption of the hearing—

> at which time the testimony and evidence shall be confined to the question of cost of service to the Tennessee Gas Transmission Company as a whole and the rate level. Upon the conclusion of the testimony with respect to the cost of service and the rate level, the Examiner should allow such period as may be necessary for the preparation of evidence respecting the reasonableness of the suspended rates which are involved in this proceeding.

The order issued October 6, 1955, conjunctively refers to the cost of service "as a whole and the rate level." Similarly, the motion of Tennessee refers to "total cost of service and the rate level." Since Tennessee is engaged in rendering jurisdictional and nonjurisdictional service, it is not possible to translate

the "total" of Tennessee's cost of service into jurisdictional "rate level" without first determining the portion of the "total" properly allocable to jurisdictional sales. Accordingly, even though we find that it is now appropriate to determine the "total" of Tennessee's cost of service, such cost of service cannot be translated into jurisdictional rates (or "rate level") until decision is made as to the proper method of allocating the "total" between jurisdictional and non-jurisdictional sales.

Fulfillment of the request of Tennessee that determination be now made as to its total cost of service and the rate level would not only require determination as to the proper method of allocating the "total" between jurisdictional and non-jurisdictional sales, but it would require also present determination as to the proper method of allocating the jurisdictional portion of the "total" between the several zones of service, or, at least, a determination that the present zone boundaries and rate differentials should be maintained for sales made on and since December 15, 1954, and continuing until final order in this proceeding. It is not possible at this incomplete state of the proceeding to determine proper zone boundaries and what method of allocating costs between zones would be fair and equitable.

As we said in the order of October 6, 1955, the prescription of just and reasonable rates for each zone requires "a thorough and exhaustive study to determine proper zone boundaries and what method of allocating costs between zones would be fair and equitable to all concerned." Only the New England interveners have been allowed to present evidence on the zoning issues; and this evidence has yet to be subjected to cross-examination. Other interveners and

the Staff will be afforded an opportunity to present such evidence in the next phase of the hearing.

Moreover, our experience tells us that, if in the future a change in Tennessee's zone boundaries or rate differentials is in order, the effect of the resultant rate on particular customers will differ dependent upon what cost of service is found proper here. On this record, however, it is not possible to now determine what the effect upon particular customers will be until resolution of the cost of service and zone issues.

Thus, we are of the opinion that it would be not only premature for us to grant that part of Tennessee's motion requesting that we at this time fix rates to be effective on and after December 15, 1954, it would also be unfair and improper.

Not having the record before us, we, of course, cannot determine now what the proper decision should be as to Tennessee's total cost of service for the test period. We have concluded that this is a decision to be made by the Presiding Examiner because we deem it necessary to a proper exercise of the Commission's function in this case that the Presiding Examiner—who has heard the case and had opportunity to evaluate fully the testimony—render an initial decision upon this point prior to any undertaking of the Commission to pass upon this aspect of the matter. It appears that the transcript of testimony exceeds 3,000 pages and that many exhibits have been introduced. The issues raised are quite complex and technical. Under these circumstances, the initial decision of the Presiding Examiner upon the issue respecting total cost of service would be helpful, not only to the Commission, but also to the parties. Accordingly, we shall deny Tennessee's instant request that the intermediate procedure be omitted so far as the non-zoning aspects of the case are involved.

In view of the foregoing, we further conclude that the Presiding Examiner, consistent with the opinions and conclusions herein expressed, should forthwith determine on the basis of the present record the total cost of service of Tennessee for the test period.

The Commission *finds:*

(1) It is appropriate and necessary in the public interest and for carrying out the provisions of the Natural Gas Act that the aforesaid motion of Tennessee be granted to the extent only that it requests that a determination be now made as to Tennessee's total cost of service.

(2) It is appropriate and necessary in the public interest and for carrying out the provisions of the Natural Gas Act that the aforesaid motion of Tennessee be denied to the extent that it also requests the present determination and fixing of the rates to be effective for jurisdictional sales made on and after December 1, 1954 and, continuing until the effective date of any Commission order subsequently issued on the zoning question.

(3) The Commission is unable to find that its functions imperatively and unavoidably require the omission of the intermediate decision procedure upon the non-zoning phase of this proceeding.

The Commission orders:

(A) Upon the expiration of the time hereinafter provided for the filing of briefs by the parties to this proceeding, the Presiding Examiner, consistent with the findings and conclusions herein set forth, shall forthwith determine Tennessee's total cost of service for the test period.

(B) Initial briefs of all parties upon the issue respecting Tennessee's cost of service for the test period, including the Commission's

Staff, shall be filed within 30 days from the date of issuance of this order; and reply briefs shall be filed within 45 days from the date of issuance of this order.

(C) Except to the extent granted in paragraph (A) above, the motion of Tennessee be and it is hereby denied.

(D) Upon the issuance of the decision contemplated by paragraph (A) above, the Presiding Examiner shall fix a date for further hearings herein concerning the issues raised as to matters other than the total cost of service of Tennessee for the test period.

By the Commission. Commissioner Conniole not participating.

Leon M. Fuquay,
LEON M. FUQUAY,
Secretary.

APPENDIX C

The following shows (1) the revenues Tennessee estimated its interim rates would yield in each of its six rate zones for jurisdictional sales and (2) the cost of service for each of these zones determined by our applying the allocation principles announced by the Commission in the Opinion in F.P.C. Docket No. G–11980 (*Tennessee Gas Transmission Co.*, decided February 6, 1962, 42 P.U.R. 3d 145) to the cost of service determined by the examiner in the second phase of this case (*Tennessee Gas Transmission Co.*, F.P.C. Docket No. G–11983, decision issued May 28, 1962).

Sales	Revenues at Interim Rates	Allocated Costs
Southern Zone	$32,335,232	$28,833,190
Central Zone	21,698,723	19,413,150
Eastern Zone	78,927,166	70,219,997
Northern Zone	57,110,143	50,557,409
New York Zone	43,185,923	38,514,783
New England Zone	32,937,267	30,908,385
Total	266,194,454	238,446,914

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